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In The Supreme Court of the United States

BILL BADI GAMMOH, MEGHANN LARA ANN ONSELEN, LESLIE WEST, ARMINE MICHELLE BEDROSIAN, CHRISTINE JOHANNA FEHER, CHRISTINE JOCELYN YOCIUS-ESCALONA, CHARBONESSE GARRETT, HEATHER ELOISE ELAM, AND STACY JOY ANDRE,

Petitioners,

v.

CITY OF LA HABRA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DEBORAH J. FOX
DAWN A. MCINTOSH
Counsel of Record
FOX & SOHAGI, LLP
10960 Wilshire Blvd.
Suite 1270
Los Angeles, CA 90024-3702
(310) 444-7805
Attorneys for Respondent City of La Habra

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court should review the Ninth Circuit's holding that the City of La Habra's ordinance requiring a two foot off stage buffer between patrons and adult cabaret performers, who are minimally clothed in the sexually charged adult cabaret environment, is constitutionally sound.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This case involves an ordinance adopted by the City of La Habra, California ("the City" or "La Habra") which imposes a modest two foot distance requirement between dancers and patrons during off stage performances (*i.e.*, lap dances) in the sexually charged atmosphere of adult cabarets. Pet. App. C. In adopting this ordinance, the City relied on an extensive administrative record of studies, cases, and other specific data regarding the negative secondary effects of adult businesses. La Habra's pre-enactment record is substantial, its ordinance is thoroughly researched and narrowly tailored to combat the identified negative side effects of adult businesses. Pet. App. A at 24a.

Respondent respectfully submits that this Court should not grant review. There is no conflict whatsoever between the circuit courts on any of the issues presented in this case, despite petitioners' attempts to recast the issues and miscite cases from other circuits to create an illusion of a circuit split. The Ninth Circuit's opinion parallels those from other circuits which have addressed similar issues in reliance on this Court's precedents. And the Ninth Circuit's decision comports with this Court's extensive body of law regarding regulation of adult businesses. Finally, this case does not involve any pressing issue of national importance regarding federal law. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

This case arose out of the City's enactment of Ordinance 1626 in 2003. Pet. at 3; Pet. App. C. Ordinance 1626 amended certain sections of the City's regulations governing adult businesses and provided operating standards to address both on stage and off stage performances that routinely occur at live adult entertainment venues.[1] Under Ordinance 1626, the City defined the term "adult cabaret dancer" and required that an "adult cabaret dancer" must maintain a modest two foot separation from patrons and may not intentionally touch patrons while performing off stage.[2] In enacting Ordinance 1626, the City found that these restrictions on adult entertainment activities were necessary to protect the public from the potential adverse secondary effects of adult businesses, including crime, deterioration of trade, blight in neighborhoods, reduction in property values, degradation of the quality of life in the City's commercial and residential areas, and the potential for the spread of sexually transmitted diseases.

In making these findings, the City relied on 18 studies conducted by various jurisdictions throughout the country regarding the social and economic secondary effects of adult businesses, 39 cases dealing with regulation of adult businesses, including 6 United States Supreme Court cases, reports and extensive information on sexually transmitted diseases and AIDS in Southern California, the Attorney General's Report on Pornography, declarations of

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[1] The full text of the City's adult business regulations found at Chapter 18.60 of the City's Municipal Code is attached as Respondent's Appendix A.

[2] The full text of the challenged sections of the City's ordinance, Sections 4, 7(F) and 7(G) is set forth at pp. 1-2 of the Petition.

La Habra police officers, vice reports from a neighboring jurisdiction, an interview with nude dancers, and other relevant information regarding the harmful effects of pornography. ER1065-3125. The City Council expressed its intent to protect the rights conferred by the United States Constitution to adult businesses while diminishing, to the greatest extent feasible, the adverse secondary effects associated with adult businesses. Pet. App. C at 59a.

This Court established a three part test to determine the validity of a municipal ordinance regulating the secondary effects of adult businesses in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), referred to as the "*Renton* framework." First, if the ordinance does not ban adult businesses or protected speech altogether, but merely restricts the proximity to sensitive uses, hours of operation or some other operational provision, it should be analyzed as a time, place and manner regulation. Second, if the ordinance is aimed at the secondary effects associated with adult businesses rather than the content of the protected expression, the ordinance is deemed content neutral and intermediate rather than strict scrutiny applies. Third, if the ordinance is designed to serve a substantial governmental interest and reasonable alternative avenues of communication remain available, the ordinance is constitutional. *Id.* at 46-50.

Most recently, in *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), this Court affirmed the *Renton* framework, as well as its prior decisions in *Young v. American Mini Theaters*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); and *City of Erie v. Pap's A.M.*, 529

U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). The voluminous administrative record supporting the City's adoption of Ordinance 1626 easily satisfies the *Renton* framework.

Petitioner Gammoh owns and operates, and petitioner dancers[3] perform, (collectively "the petitioners") at an adult cabaret, Taboo Gentlemen's Club ("Taboo"), in La Habra. Taboo features totally nude female performers, including petitioner dancers, on a fixed stage. Pet. at 3. Immediately after their totally nude main stage performance, these same dancers don minimal clothing, walk off the stage, connect with a patron and retire to more "private" areas to give lap dances.[4] Pet. App. A at 3a; ER694:2-25, 698:2-699:24. Frequently the lap dances offered at Taboo involve extreme physical contact, including a dancer vigorously rubbing herself on the male patron's clothed genitalia. ER946-1064, 200-206.

Shortly after Ordinance 1626 was adopted, petitioners filed this constitutional challenge against select portions of Ordinance 1626 in the Superior Court of California for Orange County. The case was subsequently removed to the United States District Court for the Central District of California. The District Court granted in part two motions to dismiss filed by the City and then granted summary judgment for the City on all remaining claims. Pet. App. B at 26a (ruling on summary judgment). Petitioners appealed to the Ninth Circuit only the rulings on vagueness,

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[3] And one woman who wants to be a dancer. Pet. at p. 2.

[4] "Lap dance" is a term of art in the adult entertainment industry. As one would intuitively surmise, a "lap dance" is an erotic or sexual dance performed generally in or on a male patron's lap or in close physical proximity to a patron's lap. ER194, 547, 746.

overbreadth, regulatory takings, and the First Amendment. After extensive briefing and oral argument, the Ninth Circuit affirmed the District Court's opinion in its entirety, holding: (1) the language of the ordinance is neither vague nor overbroad; (2) the ordinance easily survives intermediate scrutiny which is the proper standard for assessing a time, place or manner restriction for adult businesses; and (3) the City's administrative record supporting the ordinance is clearly sufficient under the standard reiterated in *Alameda Books*, 535 U.S. 425. Pet. App. A. at 1a. On June 30, 2005, petitioners filed a petition to seek review from this Court on only their vagueness, overbreadth and First Amendment challenges. Pet. at i-ii.

REASONS FOR DENYING THE PETITION

I. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THERE IS NO CIRCUIT SPLIT AS TO ANY OF THE QUESTIONS PRESENTED BY PETITIONERS

Petitioners grossly misstate the law in claiming there is a circuit split on their vagueness and overbreadth challenges, on the ability of municipalities to regulate dancers in adult cabarets, and on a municipality's ability to rely on studies from other jurisdictions and extensive additional data to regulate adult businesses in its community. There is no circuit split on any of these three claims.

A. The Ninth Circuit's Decision Is Completely Consistent With Cases Throughout The Various Circuits Regarding Vagueness And Overbreadth

The City's definition of an "adult cabaret dancer" provides:

> Any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting or engaging in "specified sexual activities." Adult cabaret dancer does not include a patron.

Pet. App. C at 67a. Petitioners claim that the decision of the Ninth Circuit is contrary to numerous other cases involving the same phrases found in this definition is simply false. In a strained attempt to create a conflict between circuits when there is none, petitioners grossly misstate the holdings and reasoning in every case they cite.

In *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), *cert. denied* 535 U.S. 1073 (2002), the court found the term "sexually oriented" to be overbroad because the definition could apply to a wide variety of mainstream films and videos unrelated to adult entertainment. *Id.* at 387-388. That issue is irrelevant here because the contested

provisions of La Habra's ordinance apply only to adult businesses. Pet. App. C at 67a. Furthermore, the court in *Deja Vu did not* find the term "sexually oriented" to be vague. Rather, the court found the term to be "apparently meaningless" because it had no independent utility in the ordinance – every term in the ordinance that was modified by the phrase was separately defined (*i.e.*, "sexually oriented" theater). *Id.* at 389.

Next, petitioners claim the Ninth Circuit itself concluded the phrase "sexually oriented" was unconstitutionally vague in *U.S. v. Antelope*, 395 F.3d 1128 (9th Cir. 2005), decided just one day after this case. The *Antelope* court actually reached the *opposite* conclusion. In *Antelope*, appellant challenged a provision of his supervised release prohibiting him from possessing "any pornographic, sexually oriented or sexually stimulating materials." *Id.* at 1141. Of these three listed items, the court found the word "pornographic" was unconstitutionally vague; however, the Ninth Circuit *did not* find either "sexually oriented" or "sexually stimulating" to be vague. *Accord U.S. v. Loy*, 237 F.3d 251, 266 (3rd Cir. 2001). The court refused to cure the vagueness by construing "sexually oriented" as a modifier of "pornographic" because it would be a "grammatically unnatural reading" to use terms in a list as modifiers defining one another. *Id.* at 1142.

The ordinance in *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004) was *not* similar to the La Habra ordinance. There, Rockford was attempting to regulate "exotic dancing" at nightclubs, *not* at adult businesses which were separately regulated under Rockford's Municipal Code. The court explained that terms in the ordinance such as "exotic dance," "striptease," and "sexual activity" would pass constitutional muster if the

ordinance regulated dancing by clothed individuals at clubs that present nude or semi-nude dancing. *Id.* at 405, 412. There is no dispute that the Taboo regularly features nude and semi-nude dancing, which places the phrase "sexually oriented" in a readily understandable context.

The holdings and reasoning in each of these circuit cases[5] are completely consistent with the holding and reasoning of the Ninth Circuit. Petitioners' argument is illusory; there simply is no circuit split on the issues of vagueness or overbreadth.

B. Circuit Courts Have Unanimously Upheld Separation Requirements Between Dancers And Patrons During Performances At Adult Entertainment Venues

In a strenuous effort to create conflict where none exists, petitioners grossly mischaracterize the City's ordinance and draw a false contrast between the Ninth Circuit's holding in this case and two Seventh Circuit opinions and another Ninth Circuit opinion. Ordinance 1626, Section 7(F) states simply: "As to an adult cabaret dancer then performing off stage, a distance of at least two feet (2') shall be maintained between the adult cabaret dancer and patron(s) at all times." Pet. App. C at 71a. Petitioners claim that this two foot separation requirement "proscrib[es] the particular movements and gestures that a dancer may make during the scope of a performance." Pet.

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[5] Petitioners also misrepresent *Eggert Group, LLC v. Town of Harrison*, 372 F.Supp.2d 1123 (E.D. Wis. 2005), a district court case, which is irrelevant for purposes of establishing a split between circuit courts.

at 19. This is blatantly false. This provision has no effect on the movements or gestures a dancer makes during a performance, it merely requires that she distance herself two feet from the patron.

The only circuits to directly address this issue (*i.e.*, the Fifth, Sixth, Seventh and Ninth Circuits), have all upheld separation requirements between patrons and performers at adult establishments which feature nude and/or semi-nude dancing. *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1061 (9th Cir. 1986) [validating a ten foot separation requirement]; *BSA, Inc. v. King County,* 804 F.2d 1104, 1111 (9th Cir. 1986) [six foot separation requirement]; *Colacurcio v. City of Kent,* 163 F.3d 545, 554 (9th Cir. 1998), *cert. denied* 529 U.S. 1053 (2000) [ten foot separation requirement]; *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 413 (6th Cir. 1997) [six foot separation requirement]; *G.M. Enterprises v. Town of St. Joseph,* 350 F.3d 631 (7th Cir. 2004), *cert. denied* 125 S.Ct. 49 (2004) [five foot separation requirement]; *LLEH, Inc. v. Wichita County,* 289 F.3d 358, 368 (5th Cir. 2002) [six foot separation requirement]. It has been repeatedly recognized by the appellate courts that "While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired." *Kev,* 793 F.2d at 1061.

Unlike the challenged provision in La Habra's ordinance, each of the cases cited by petitioners involved ordinances that prohibited specific movements by the dancer during her performance. In both *Schultz v. City of Cumberland,* 228 F.3d 831 (7th Cir. 2000) and *Dream Palace v. County of Maricopa,* 384 F.3d 990 (9th Cir. 2004), the government entities adopted regulations that prohibited sexually explicit dance moves and nudity at adult

businesses. Both courts found this to be a total ban on nude and semi-nude dancing and an unconstitutional burden on expression. *Schultz*, 228 F.3d at 847; *Dream Palace*, 384 F.3d at 1018. In contrast, La Habra allows totally nude dancing on the fixed center stage and neither of petitioners' cited cases addressed separation requirements between dancers and patrons.

In *R.V.S.*, 361 F.3d 402, Rockford's ordinance regulated mainstream performances involving "erotic dancing" at nightclubs; it specifically did *not* apply to adult businesses. The court found that Rockford had little to no evidence of negative secondary effects associated with non-adult businesses and that the regulation was essentially a restriction on erotic dance movements. *Id.* at 413-414. *R.V.S.* did not involve separation requirements between dancers and patrons at live adult entertainment venues.

The dictum referenced by petitioners in *Jakes, Ltd., Inc. v. City of Coates*, 356 F.3d 896 (8th Cir. 2004), is just that – dictum. The Eighth Circuit determined an injunction issued by the trial court was overly broad in that it permitted Coates to seek contempt remedies if the plaintiff operated any adult business at the location rather than the type of adult business which resulted in the citation. The court did not address separation requirements between patrons and dancers.

There is no circuit split regarding separation requirements between patrons and performers at adult live entertainment venues.

C. The Ninth Circuit's Decision Regarding The Ability Of Municipalities To Regulate Lap Dancing In Adult Cabarets Is Completely Consistent With Decisions From Other Circuits

Petitioners erroneously assert that the Ninth Circuit's decision conflicts with other circuits regarding the secondary effects data necessary to justify regulation of performances by minimally clothed performers engaged in lap dancing[6] at adult businesses. In support of this assertion, petitioners continue to quote cases out of context and misrepresent their holdings in order to create the illusion of a conflict between circuits where none exists.

Petitioners also continue to push the fiction that the dancers who must comply with the two foot rule during off stage performances (lap dances) are "clothed" and claim that data pertaining to nude dancing is inapplicable. Pet. at 25-28. As they have from the beginning of this case, petitioners overlook the undisputed fact that Taboo is an "adult cabaret" featuring totally nude dancers on a raised stage who immediately move off stage and conduct more "private" lap dances. The lap dancing activities are integrally interwoven with the nature of the establishment

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[6] While nude dancing has been found to lie at the outer margins of protected speech (*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560), the extreme conduct of off stage females gyrating on the groin of male patrons lies outside the margins of protected activity. *See Kev*, 793 F.2d at 1061; *Erie*, 529 U.S. at 317, n.1 (Stevens, J., dissenting) ["respondent does not contend that there is a constitutional right to engage in conduct such as lap dancing"]; *Colacurcio*, 163 F.3d 545, 556 ["We conclude that table dancing in private nightclubs, with its documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment"]; *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995).

and the type of sexually charged entertainment offered at Taboo. In fact, the Ninth Circuit had no trouble concluding that these performances "are certainly within the limits of 'sexual speech.'" Pet. App. at 16a.

The off stage performances which include lap dances occur just minutes after the dancers perform totally nude on stage and involve only the most minimal of clothing. Pet. App. at 15a. The Ninth Circuit relied on the petitioner-dancers' own testimony that their outfits for dancing off stage include bikinis and g-strings and found these accouterments stretch the term "fully clothed." *Id.*

Petitioners claim that these lap dances are "no contact" is also farcical. In support of its motion for summary judgment, the City submitted four police reports describing lap dances received by undercover officers at Taboo between August 2003 and March 2004. Petitioners did not submit any evidence at any stage of this case that directly contradicted the sworn testimony of the officers in these police reports. One of these police reports describes the dancer's conduct during the lap dance as follows:

> During these dances, [the dancer] continually rubbed her genital area on my crotch area. . . . At one point, . . . she put her right hand down the front of her panties and appeared to be masturbating herself. She also pulled her bra away from her body (exposing her breasts) and then pressed her breasts into my face.

ER973.

Once the performances in question are understood in context, it becomes abundantly clear why the cases cited by petitioners from other circuits are inapposite or do not conflict with this case. In *R.V.S.*, the Seventh Circuit

explained that the scanty evidence offered in support of the ordinance which only regulated clothed dancing at mainstream nightclubs would have been sufficient if the ordinance had regulated clothed dancing at establishments like Taboo which offer nude and semi-nude dancing. *R.V.S.*, 361 F.3d at 412.

Petitioners mischaracterize this holding of the *R.V.S.* court by erroneously substituting the word "clothed" for the word "type" in the Court's conclusion: "[W]e conclude that [the evidence] falls short of being relevant to establishing a meaningful connection between negative secondary effects and the **type** of entertainment to which the Ordinance applies." *Id.*, emphasis added; *see* Pet. at 27. The "type" of entertainment the court was referring to was clothed dancing at non-adult, mainstream establishments which did not offer nude or semi-nude entertainment. *Id.* The *R.V.S.* holding is on all fours with this case.

The Eighth Circuit opinion in *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001), is also completely consistent with this opinion. In that case the court held at p. 519:

> [The ordinance] did not exclusively cover conduct in adult entertainment businesses, which has been recognized to cause harmful secondary effects, *see Pap's A.M.*, 529 U.S. at 296-97, . . . but also covered conduct in "any business or commercial establishment," which could include theater performances, ballet performances, and many other forms of live entertainment. The Lincoln City Council referred to no findings that theatrical kissing and ballet lifts cause harmful secondary effects.

Petitioners omit a key detail in their discussion of *Flanigan Enterprises, Inc. v. Fulton County*, 242 F.3d 976

(11th Cir. 2001) and *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), which completely distinguishes those cases from the case at bar. In *Flanigan*, the county commissioned two studies which showed (1) no correlation between an increase in crime and adult establishments which served alcohol, and (2) local adult businesses had no negative economic impacts on their surrounding environs. Fulton County then ignored their own commissioned studies in adopting a regulation banning alcohol at adult businesses. The court acknowledged that while "the governmental entity is not required to perform empirical studies," once having done so, it cannot ignore the results. 242 F.3d at 986, citing *Erie*, 120 S.Ct. at 1395.

In *Peek-a-Boo Lounge*, the administrative record before the planning commission included two volumes of materials showing lower crime rates near the adult businesses than surrounding areas, an increase in property values near the adult businesses, satisfactory health and safety reports of the adult businesses, and an award received by Peek-a-Boo Lounge from the local police department for its "outstanding contribution to the community." 337 F.3d at 1270. Manatee County then adopted ordinances regulating adult businesses ignoring all of this local data which showed a lack of secondary effects from adult businesses in this particular community. *Id.* at 1271-1272; *see also Alameda Books*, 535 U.S. at 438-439.

It is undisputed in this case that La Habra *did not* conduct any empirical studies that it then ignored. Pet. at 5. The administrative record does not contain any contrary studies or data submitted for consideration to the Planning Commission or City Council. ER1065-3125. The only "study" mentioned by petitioners regarding crime data in

La Habra was prepared by petitioners' "expert" a year after La Habra adopted Ordinance 1626.[7] *Id.* In adopting the adult ordinance, La Habra relied on several volumes of data, including local data: declarations of La Habra undercover police officers from undercover operations at the Taboo, vice reports from sister jurisdictions, extensive reports on sexually transmitted diseases and AIDS including local data focused within Southern California, an interview with nude dancers, experiences of other jurisdictions reflected in over 18 studies, 39 cases (including six opinions from this Court), and the Attorney General's Report on Pornography. Pet. App. C at 20a; ER1065-3125. All of this data supports the City's position that the ordinance serves a substantial governmental interest in minimizing the negative secondary effects associated with adult businesses. This case is certainly distinguishable from *Flanigan* and *Peek-a-Boo Lounge* on its facts. There is no circuit split.[8]

II. THE DECISION BELOW IS PLAINLY CORRECT

A. The Ninth Circuit Properly Applied This Court's Precedents In Finding Ordinance 1626 Was Not Vague

A regulation may be deemed unconstitutionally vague for First Amendment purposes if its terms are (1) not framed with "sufficient definiteness that ordinary people can understand what conduct is prohibited or (2) framed

[7] The City avers that petitioners' characterization of the conclusions of this "study" are grossly exaggerated.

[8] The only other cases referenced (and similarly misrepresented) by petitioners are district court cases which are irrelevant for purposes of a circuit split.

in a manner that encourages arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *U.S. v. Thomas*, 864 F.2d 188 (D.C. Cir. 1988). The requirement that an ordinance not encourage arbitrary and discriminatory enforcement means the ordinance must "establish minimal guidelines to govern law enforcement," which do not permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. 352, 357-358.

Ordinance 1626 provides persons of ordinary intelligence fair notice of what conduct is prohibited and sufficient guidance for law enforcement. In order to fall within the ambit of the definition, a person must perform (1) at an adult cabaret; (2) as a sexually oriented dancer, exotic dancer, stripper, go-go dancer or other similar dancer; and the performance must (3) focus on or emphasize the dancer's breasts, genitals and/or buttocks; (4) on a regular basis; and (5) on a substantial basis. Pet. App. C at 67a.

First, the definition of an "adult cabaret dancer" only applies to persons who are employees or independent contractors of "adult cabarets" or "adult businesses." Petitioners readily admit that Taboo is an "adult cabaret" as defined by the City's Adult Use Ordinance. Pet. at 2. Once it has been established that someone is an employee or independent contractor of Taboo, one looks to the remainder of the definition to determine if that person is an "adult cabaret dancer."

Petitioners rely heavily on snippets of testimony by Officer McPhail, a detective with the La Habra Police

Department, Special Investigations Unit. Officer McPhail acknowledged that some of the terms such as "exotic dancer," when taken out of context, might involve some degree of subjectivity. Importantly, when questioned as to the definition as a whole for "adult cabaret dancer," Officer McPhail testified that the definition was sufficiently clear and readily understandable in the context of an adult cabaret. ER815-16.

The definition also explains that the independent contractor/employee must perform as a sexually oriented dancer, *et al.*, and the performance must on a regular and substantial basis focus on or emphasize the dancer's breasts, genitals or buttocks. Terms that petitioners claim are too vague and subjective within this definition, *i.e.*, "regular and substantial basis" and "focuses on or emphasizes," are virtually identical to language that has repeatedly survived vagueness challenges and found to be readily understandable to persons of ordinary intelligence. *See Young,* 427 U.S. 50, 58-61 ["characterized by an emphasis on"]; *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1419 (8th Cir. 1994), *cert. denied* 513 U.S. 1017 (1994) ["substantial or significant portion" and "characterized by an emphasis on"]; *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1198-1199 (9th Cir. 2004); *Kev*, 793 F.2d 1053; *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 833 (4th Cir. 1979), *cert. denied* 447 U.S. 929 (1980).

Petitioners also claim that the phrase "sexually oriented" is vague, despite the fact that numerous courts have found this phrase was *not* vague, including several cases cited by petitioners. Pet. at 14-15; *see Antelope*, 395 F.3d 1128, 1142; *U.S. v. Loy*, 237 F.3d 251, 262; *U.S. v. Various Articles of Obscene Merchandise, Schedule No.*

2102, 709 F.2d 132, 135 (2nd Cir. 1983). The apparent celestial precision demanded by petitioners is not constitutionally required. *Hart Book Stores, Inc.*, 612 F.2d 821, 833, citing *Miller v. California*, 413 U.S. 15, 27-28, n.10, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

La Habra's definition is a far cry from the anti-gang ordinance found invalid in *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), which left law enforcement virtually unlimited discretion to single out members of unpopular groups and subject them to criminal penalties based on subjective considerations. In *Morales*, a person was subject to criminal penalties if a police officer reasonably believed him to be a street gang member who was loitering in a public place with other persons and that person did not disperse when ordered to do so. *Id.* at 47, n.2. "Loitering" was defined as "to remain in one place with no apparent purpose." *Id.* at 56. The Court found that the "no apparent purpose" standard depends upon whether some purpose is "apparent" to the officer on the scene and that this vast amount of discretion rendered the ordinance vague. *Id.* at 61.

In contrast, Ordinance 1626 relies on terminology that is frequently used and is well understood in the context of adult businesses and which courts have repeatedly found provides ample guidance for law enforcement personnel. As the Ninth Circuit explained:

> The combined terms [in the definition of an adult cabaret dancer] outline the performer, the place of the performance, and the type of performance. Each of the five limitations provides context in which the other limitations may be clearly understood. The definition as a whole gives notice to performers and ample guidance to law enforcement

> officers as to who is and who is not an "adult cabaret dancer."

Pet. App. A at 7a.

Furthermore, the terms challenged as vague do not appear directly in any prohibitory provision of the Ordinance. There is no penalty or possibility of enforcement action based merely on being an "adult cabaret dancer." The significance of the definition lies only in that Section 7(F) of the Ordinance requires that "adult cabaret dancers" performing off stage must maintain a two foot distance from patrons. In order to be subject to enforcement under Section 7(F), a performer would have to both meet the definitional requirements of an "adult cabaret dancer" *and* violate the two foot distance restriction. The Ninth Circuit held that "[t]his distinction introduces additional objectivity into the Ordinance because the act that is prohibited – being within two feet of a patron – is certainly not vague." Pet. App. A at 8a.

The Ninth Circuit acknowledged this Court's long-standing premise that the vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms, even in the First Amendment context. Pet. App. A at 8a; *Grayned*, 408 U.S. 104, 110 ["we can never expect mathematical certainty in our language."]; *Kovacs v. Cooper*, 336 U.S. 77, 79, 69 S.Ct. 448, 93 L.Ed. 513 (1949); *U.S. v. Thomas*, 864 F.2d 188, 195; *Cal. Teachers Ass'n v. State Board of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) ["perfect clarity is not required even when a law regulates protected speech."]. Statutes and ordinances need not be crafted to "satisfy those intent with finding fault at any cost," but are adequate if "set out in terms that the ordinary

person exercising ordinary common sense can sufficiently understand and comply" with the ordinance. *Broadrick v. Oklahoma,* 413 U.S. 601, 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A regulation satisfies this requirement in the First Amendment context so long as it gives "fair notice" of what conduct or activities are within the scope of the regulation. *U.S. v. Thomas*, 864 F.2d at 194-195.

The Ninth Circuit correctly applied this Court's precedents in holding that the terms used in the definition of an "adult cabaret dancer," in combination with the clear objectivity of the prohibited conduct, give sufficiently clear notice to performers and ample guidance to law enforcement personnel. Pet. App. A at 8a.

B. The Ninth Circuit Was Clearly Correct In Finding That The Definition Of "Adult Cabaret Dancer" In Ordinance 1626 Is Not Overbroad

This Court has repeatedly emphasized that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); *Broadrick*, 413 U.S. 601, 615. "There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). There is no such danger here.

Petitioners assert the definition of "adult cabaret dancer" is overbroad because it "can include a wide variety of innocuous performances that could not lead to adverse secondary effects." Pet. at 16. As usual, petitioners completely ignore the context of the definition – it *only* applies to performers at an adult cabaret which features nude/semi-nude dancing. Within this sexually charged atmosphere, the two foot separation requirement *only* applies to performances by an "adult cabaret dancer" who meets the five criteria described above. The context distinguishes this case from both cases cited by petitioners, *R.V.S.*, 361 F.3d 402 [ordinance overbroad because it applied to non-adult businesses unconnected to the well documented secondary effects associated with adult businesses], and *Deja Vu,* 274 F.3d 377 [definition in ordinance overbroad because it applied to mainstream performances as well as adult businesses].

Furthermore, the ordinance is narrowly tailored to address the secondary effects the City is attempting to prevent. The Ninth Circuit's reasoning is sound:

> Regardless of whether the dance is a tango or more typical adult entertainment, requiring a two-foot separation between dance partners in this highly-charged sexual atmosphere may reasonably advance the City's legitimate goal of reducing secondary effects of adult entertainment. The two-foot rule may, for example, provide a line of sight for enforcement of the "no-touch" rule and prevent exchanges of money and drugs.

Pet. App. A at 10a.

While petitioners may land on a fanciful hypothetical which reaches beyond the City's legitimate goals, this is not the constitutional test. Rather, this Court held in

Vincent, 466 U.S. 789, 800, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." The Ninth Circuit properly applied this Court's precedents in holding "[i]f an overbroad application of the Ordinance exists, it is insubstantial when 'judged in relation to the statute's plainly legitimate sweep.'" Pet. App. A at 10a, quoting *Broadrick*, 413 U.S. 601, 612-615.

C. Ordinance 1626 Furthers The City's Legitimate Governmental Interest In Preventing Secondary Effects And Does Not Violate The First Amendment

This Court outlined a three part test in *Renton*, 475 U.S. 41, to assess the validity of an adult business ordinance. First, if the ordinance does not ban adult businesses altogether, but requires distances from sensitive uses or imposes operational restrictions, it should be analyzed as a time, place and manner restriction. *Id.* at 46; *Alameda Books*, 535 U.S. 425, 434. Second, if the ordinance is aimed at the secondary effects of the adult businesses in the community, the ordinance is deemed content-neutral[9] and is subject to intermediate rather than strict scrutiny. *Renton*, 475 U.S. at 47-49. Third, the ordinance must be upheld if it is designed to serve a substantial governmental interest and reasonable alternative avenues of communication exist. *Id.* at 50.

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[9] In *Alameda Books*, Justice Kennedy explained that calling these ordinances content-neutral has always been somewhat of a fiction. In reality, they are content-based. Regardless, the holding of *Renton* remains sound and ordinances such as the one at bar are subject to intermediate, not strict scrutiny. *Alameda Books*, 535 U.S. at 448.

1. This Court Has Held That The Appropriate Standard Of Review For A Time, Place And Manner Restriction On Adult Businesses Is Intermediate, Not Strict Scrutiny

Separation requirements perform a number of unquestionably legitimate functions to reduce secondary effects, even between minimally clothed performers and patrons, including preventing the exchange of money for prostitution or drug transactions between performers and patrons, reinforcing constitutional no touching provisions, and providing a clean line of sight for enforcement. *Colacurcio*, 163 F.3d at 554 [no touch ordinances would be virtually unenforceable if there were no separation requirement];[10] *DLS*, 107 F.3d 403, 412; *Tily B., Inc. v. City of Newport Beach*, 69 Cal.App.4th 1, 23, 81 Cal.Rptr.2d 6 (1998). It is the purview of the legislature to determine the scope of the regulation necessary to address these deleterious secondary effects and La Habra's ordinance is narrowly tailored to achieve these objectives.

Petitioners claim that Ordinance 1626 acts as a complete ban on the expressive conduct within two feet of a patron (Pet. at 22-23) and therefore, contend that it fails Justice Kennedy's test that a city may not reduce secondary effects by reducing speech in the same proportion. Pet. at 9. This premise has been summarily rejected time and again by the Fifth, Sixth, Seventh and Ninth Circuits, who have routinely upheld separation requirements of three, six, and even ten feet between performers and

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[10] This was one of the concerns which led the City Council to adopt the two foot separation requirement in Ordinance 1626. ER3158:12-3159:19.

patrons at adult businesses. *See* discussion at I.B., *supra*. In *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153, 1163 (9th Cir. 2003), *cert. denied* 541 U.S. 973 (2004) (*"CFPP"*), the Ninth Circuit explained "[t]he application of Justice Kennedy's proportionality analysis to this particular type of secondary effects law would invalidate all such laws, and we are satisfied that he never intended such a result."

The separation requirements in Ordinance 1626 are standard operating restrictions designed to prevent secondary effects associated with adult businesses, including crime, deterioration of trade, reduction of property values and quality of life in the City's commercial and residential areas, and the potential for spread of sexually transmitted diseases. Pet. App. C. at 51a-52a. Such requirements have been uniformly classified by this Court as time, place and manner restrictions subject to intermediate scrutiny. *Renton*, 475 U.S. at 46; *Alameda Books*, 535 U.S. 425, 434; *CFPP*, 336 F.3d 1153, 1164; *Colacurcio*, 163 F.3d 545, 549-551. The Ninth Circuit properly applied intermediate scrutiny here.

2. The Ninth Circuit's Decision Is Consistent With This Court's Decision In *Alameda Books*

In *Alameda Books*, this Court specifically addressed a key issue involved in this case – how much evidence is required for a City to sustain a secondary effects ordinance regulating adult uses such as the one at bar. Justice O'Connor reiterated that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent governmental interest." *Id.* at 438.

Justice O'Connor clarified, however, that a municipality cannot rely on shoddy data or reasoning and must rely on evidence that fairly supports its rationale for its ordinance. *Id.* at 438. "If a plaintiff can cast direct doubt on the municipality's rationale by demonstrating that its evidence does not support its rationale or by furnishing evidence that disputes the municipality's findings, the burden shifts back to the municipality to demonstrate that its ordinance is in fact designed to further a substantial governmental interest." *Id.* at 439.

Petitioners grasp onto this language and argue that it vitiates the *Renton* framework, substantially raising the government's evidentiary bar. Petitioners' interpretation of *Alameda Books* is unsupported by its holding, and was expressly rejected by the plurality and Justice Kennedy's concurrence, the controlling opinion of the case.[11] Justice Kennedy explained:

> . . . [W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. . . . "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." . . . As a general matter, courts should not be in the business of second-guessing

[11] *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ["When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds."].

> fact-bound empirical assessments of city planners.

Alameda Books, 535 U.S. at 451 (citations omitted).

After explaining this standard in detail, this Court affirmed that the *Renton* framework was still sound. *Id.* at 448. Thus, *Alameda Books* added some clarity to gray areas not fully fleshed out in these earlier cases; it did *not* create a sea change in the applicable standards. *See CFPP*, 336 F.3d at 1162.

As to the quantum of evidence, this Court has found that markedly less evidence than La Habra relied on is sufficient for a legislative body to take action to protect its citizens from the harmful secondary effects of adult businesses. *See Erie*, 529 U.S. 277; *see also Alameda Books*, 535 U.S. 425. In *Erie*, the record contained no evidence that members of the city council had reviewed studies from other cities, had taken witness testimony, or had put evidence in the record regarding their own experiences with adult businesses. This Court held that none of this was necessary and found that Erie reasonably relied on the evidentiary foundation in *Renton* and *Young* and the discussion of secondary effects in *Barnes*, 501 U.S. 560, and held these judicial opinions constituted "evidence . . . reasonably believed to be relevant to the problem the city [was] addressing." 529 U.S. at 297; *see also Renton*, 475 U.S. at 51-52.

In *G.M. Enterprises*, 350 F.3d 631, 639-40, the town adopted an ordinance with an administrative record similar to the one here. The adult business submitted similar data to that offered here by petitioners after the administrative proceedings were closed, and, like petitioners, claimed that this data shifted the burden back to the

municipality under *Alameda Books*. *Id.* at 635-636. As the Ninth Circuit did in this case, the court in *G.M. Enterprises* rejected this argument, holding:

> *Alameda Books* does not require a court to reweigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed.

G.M. Enterprises, 350 F.3d at 639-640.

Given the low level of evidence required for the government to properly support a secondary effects ordinance, and the high level of deference it is afforded, the plaintiff's burden to "cast direct doubt" on the government's rationale is very high. *See World Wide Video,* 368 F.3d at 1195-96; *CFPP*, 336 F.3d at 1168. Petitioners do not directly contest the majority of evidence relied upon by the City, they simply claim it is irrelevant because Taboo offers lap dances by bikini-clad versus nude performers. Such precision has never been required. *Alameda Books*, 535 U.S. at 438. Thus, the Ninth Circuit's conclusion that petitioners did not "present[] evidence sufficient to create a genuine issue of material fact as to whether the two-foot separation requirement is designed to further a substantial governmental interest in preventing the secondary effects of adult businesses" is completely consistent with this Court's opinion in *Alameda Books.* Pet. App. A at 22a-23a.

III. PETITIONERS GROSSLY OVERSTATE THE NATIONAL SIGNIFICANCE OF THIS CASE

This case does not warrant granting a writ of certiorari. This case is a standard challenge to a carefully crafted adult business regulation. The City's ordinance requires a two foot separation between adult cabaret dancers and patrons during off stage performances (lap dances) at adult cabarets featuring nude and/or semi-nude performances. Separation requirements between performers and patrons at adult businesses with a sexually charged atmosphere such as Taboo have been unanimously upheld by the Fifth, Sixth, Seventh and Ninth Circuits. *See* I.B., *supra*. The City relied on several volumes of studies, cases and other relevant data in adopting this ordinance, which is more narrowly tailored to reduce secondary effects than similar ordinances found to be constitutionally sound. No circuit court has found an administrative record such as the City's record for Ordinance 1626 to be insufficient for an ordinance regulating performances at adult cabarets.

Petitioners go to great lengths in their petition to make the Ninth Circuit's decision seem expansive when it merely applies settled law. This case is not about regulating clothed dancing at mainstream nightclubs or in mainstream theatrical performances as with many of the cases they cite. *See R.V.S.*, 361 F.3d 402, and *Deja Vu*, 274 F.3d 377. These courts, when faced with such regulations, noted that the analysis would be more routine under the *Renton* framework if the regulation applied to adult businesses, as is the case here. There is no compelling federal question here which warrants this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DEBORAH J. FOX
DAWN A. MCINTOSH
Counsel of Record
FOX & SOHAGI, LLP
Attorneys for Respondent
City of La Habra

APPENDIX A

80

Chapter 18.60

ADULT USES

Sections:

18.60.010 Definitions.
18.60.020 Locational limitations.
18.60.030 Regulation of adult booth/individual viewing area.
18.60.050 Access provision.
18.60.060 Business license.
18.60.070 On-site manager – Security measures.
18.60.080 Hours of operation.
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18.60.090 Adult business offering adult live entertainment – Operating requirements.
18.60.100 Lighting requirements.
18.60.110 Permit – Requirements.
18.60.120 Permit – Contents of application.
18.60.130 Permit – Application fee.
18.60.140 Permit – Decision to grant or deny.
18.60.150 Permit – Appeal.
18.60.160 Permit – Judicial review of decision to grant or deny.
18.60.170 Permit – Expiration.
18.60.180 Permit – Review for compliance.
18.60.190 Permit – Approval criteria.
18.60.200 Permit – Revocation.
18.60.210 Amortization of legal nonconforming uses.
18.60.220 Applicability to other regulations.
18.60.230 Conduct constituting a public nuisance.
18.60.240 Violations – Penalties.
18.60.250 Severability.

18.60.010 Definitions.

In addition to the definitions contained in this code, the following words and phrases shall, for the purposes of this chapter, be defined as follows, unless it is clearly apparent from the context that another meaning is intended. Should any of the definitions be in conflict with the current provisions of this code, these definitions shall prevail:

"Adult arcade" means any place to which the public is permitted or invited and where coin or slug operated or electronically, electrically or mechanically controlled amusement devices, still or motion picture machines, projectors or other image-producing devices are maintained to show images on a regular or substantial base, where the images so displayed are distinguished or characterized by an emphasis on depicting or describing "specified sexual activities" or "specified anatomical areas."

"Adult bookstore" means an establishment having as a regular and substantial portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas."

"Adult booth/individual viewing area" shall mean a partitioned or partially enclosed portion of an adult business used for any of the following purposes:

A. Where a live or taped performance is presented or viewed, where the performances and/or images displayed or presented are distinguished or characterized by their emphasis on matter depicting, describing, or relating to

"specified sexual activities" or "specified anatomical areas";

B. Where a live or taped performance by an adult cabaret dancer is presented or viewed;

C. Where adult arcade devices are located.

"Adult business" means any business establishment or concern which as a regular and substantial course of conduct performs as an adult bookstore, adult theater, adult motion picture arcade, adult cabaret, adult model studio, adult motel or hotel, or sells or distributes adult merchandise or sexually oriented merchandise, or any other business or concern which offers to its patrons products, merchandise, services or entertainment characterized by an emphasis on matters depicting, describing, or relating to "specified sexual activities" or "specified anatomical parts," but not including those uses or activities which are preempted by state law.

"Adult cabaret" means a nightclub, bar or other establishment (whether or not serving alcoholic beverages) which features live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

"Adult cabaret dancer" shall mean any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular

and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and/or buttocks, but does not involve exposure of "specified anatomical areas" or depicting or engaging in "specified sexual activities." Adult cabaret dancer does not include such [sic] a patron.

"Adult dance studio" means any establishment or business which provides for members of the public a partner for dance where the partner, or the dance, is distinguished or characterized by the emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

"Adult hotel/motel" means a hotel or motel, as defined in this code, which is used for presenting on a regular and substantial basis material which is distinguished or characterized by the emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" through closed circuit or cable television or through video tape recorder where video tapes are provided by the hotel/motel.

"Adult live entertainment" means any physical human body activity, whether performed or engaged in, alone or with other persons, including but not limited to singing, walking, speaking, dancing, acting, posing, simulating, wrestling or pantomiming, in which the performer or performers expose to public view, without opaque covering, "specified anatomical areas," or depicting, describing, or relating to "specified sexual activities" whether or not the specified anatomical areas are covered.

"Adult oriented merchandise" means sexually oriented implements or paraphernalia, such as, but not limited to: dildos, auto sucks, sexually-oriented vibrators, Ben Wa balls, inflatable orifices, anatomical balloons with orifices,

simulated and battery operated vaginas, and similar sexually-oriented devices which are designed or marketed primarily for the stimulation of human genital organs or sado-masochistic activity.

"Adult theater" means a theater or other commercial establishment with or without a stage or proscenium which is used for presenting, on a regular and substantial basis, material which is distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

"Figure modeling studio" means any establishment or business which provides for members of the public, the services of a live human model for the purpose of reproducing the human body, wholly or partially in the nude, by means of photograph, painting, sketching, drawing or other pictorial form.

"Material" relative to adult businesses means and includes, but is not limited to, accessories, books, magazines, photographs, prints, drawings, paintings, motion pictures, and pamphlets, or any combination thereof.

"Performer" shall mean any person who is an employee or independent contractor of an adult business, and who, with or without any compensation or other form of consideration, performs adult live entertainment for patrons of an adult business. Performer does not include a patron.

"Residential zone" means any property within the city which carries a zoning designation permitting the location of a residence, including R-1-A, R-1-B, R-1-C, R-2, R-3, R-4, MHP (mobile home park) and in the specific plan for La

Habra Boulevard the designations of low density residential, medium density residential, high density and transitional residential/commercial. However, this does not include zones where a residence is permitted pursuant to a conditional use permit or other special permit.

"Special needs housing" means congregate housing, domestic violence shelters, homeless shelters, senior hotels, single room occupancy housing and transitional housing facilities as defined in Chapter 18.21 of this code.

"Specified anatomical areas" means:

A. Less than completely and opaquely covered:

1. Human genitals, pubic region;

2. Buttock; or

3. Female breast below a point immediately above the top of the areola; or

B. Human male genitals in a discernible turgid state, even if completely and opaquely covered.

"Specified sexual activities" means:

A. Human genitals in a state of sexual stimulation or arousal; and/or

B. Acts of human masturbation, sexual stimulation or arousal; and/or

C. Use of human or animal ejaculation, sodomy, oral copulation, coitus or masturbation; and/or

D. Masochism, erotic or sexually-oriented torture, beating, or the infliction of pain; and/or

E. Human excretion, urination, menstruation, vaginal or anal irrigation; and/or

F. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast. (Ord. 1626 §§ 2, 3, 4, 2003; Ord. 1620 § 2 (part), 2002; Ord. 1553 § 11, 1999; Ord. 1540 § 11, 1998; Ord. 1539 § 11, 1998; Ord. 1481 § 3 (part), 1994)

18.60.020 Locational limitations.

A. Subject to the limitations of this chapter, adult businesses may be located in the C-2 commercial zone; C-2S community shopping center zone; C-3 general commercial zone; PCI planned commercial-industrial zone; and M-1 manufacturing zone.

B. In those land-use districts where the adult businesses regulated by this chapter would otherwise be permitted uses, it is unlawful to establish any such adult business if the location is:

1. Within a two hundred seventy-five-foot radius of any residential zone. The distance between a proposed use and a residential zone shall be measured from property line to property line;

2. Within one hundred fifty feet of any other adult use regulated under this chapter. The distance between two adult uses shall be measured along the most direct route available for use by the public between the property line housing an adult facility and the closest point of the property line of any other regulated adult use under this chapter;

3. Within two hundred fifty feet of any source-sensitive uses including schools, churches, parks, day care facilities, special needs housing facilities. The distance between the proposed use and a source-sensitive use shall be measured from property line to property line from the proposed adult-use site to the source-sensitive site, along a straight line extended between the two points.

C. The establishment of any adult business shall include the opening of such a business as a new business, the relocation of the business, or the conversion of an existing business location to any adult business use. (Ord. 1504 § 2, 1996; Ord. 1481 § 3 (part), 1994)

18.60.030 Regulation of adult booth/individual viewing area.

A. No adult booth/individual viewing area shall be occupied by more than one individual at a time. This restriction shall not apply to an adult booth/individual viewing area where the performer or adult cabaret dancer is completely separated from the area in which the performer or adult cabaret dancer is viewed by an individual by a permanent, floor to ceiling, solid barrier. However, in the scenario where a permanent, floor to ceiling, solid barrier is in place, no performers or adult cabaret dancers shall be allowed to perform inside the portion of the adult booth/individual viewing area where the patron is located, nor can the area be occupied by more than one patron.

B. Each adult booth/individual viewing area within the adult business shall be visible from the manager's station(s) in a public portion of the establishment, and shall not be obscured by any door, curtain, wall, two-way

mirror or other device which would prohibit a person from seeing the interior of the adult booth/individual viewing area from a manager's station or stations located in the public portion of the establishment. A manager shall be stationed in each of the manager's station or stations at all times the business is in operation or open to the public.

C. No doors are permitted on an adult booth/individual viewing area.

D. No holes or other openings shall be permitted between adult booths/individual viewing areas. Any such hole or opening shall be repaired within twenty-four hours using "pop" rivets to secure metal plates over the hole or opening to prevent patrons from removing the metal plates.

E. No beds shall be permitted in an adult booth/individual viewing area. (Ord. 1626 § 5, 2003)

18.60.050 Access provision.

A. The operator shall not permit any doors on the premises to be locked during business hours and, in addition, the operator shall be responsible to see that any room or area on the premises shall be readily accessible at all times and shall be open to view in its entirety for inspection by any law enforcement officer.

B. Access to X-rated movies or video tapes shall be restricted to persons over eighteen years of age. If an establishment that is not otherwise prohibited from providing access to persons under eighteen years of age sells, rents, or displays videos that have been rated "X" or rated "NC-17" by the motion picture rating industry

(MPAA), or which have not been submitted to the MPAA for a rating, and which consist of images which are distinguished or characterized by an emphasis on depicting or describing "specified sexual activities" or "specified anatomical areas," said videos shall be located in a specific section of the establishment where persons under the age of eighteen shall be prohibited. (Ord. 1481 § 3 (part), 1994)

18.60.060 Business license.

A person shall not own, operate, manage, conduct or maintain an adult business without first having obtained a business license from the business license clerk. The issuance or denial of the business license shall be made within fifteen days of the applicant's submitted application. (Ord. 1481 § 3 (part), 1994)

18.60.070 On-site manager – Security measures.

A. All adult businesses shall have a responsible person who shall be at least eighteen years of age and shall be on the premises to act as manager at all times during which the business is open. The individual designated as the on-site manager shall be registered with the city's planning director by the owner to receive all complaints and be responsible for all violations taking place on the premises.

B. The adult business shall provide a security system that visually records and monitors all parking lot areas, or in the alternative, security guards to patrol and monitor the parking lot areas. (Ord. 1481 § 3 (part), 1994)

18.60.080 Hours of operation.

A. It is unlawful for any operator of an adult business to allow such adult business to remain open for business, or to permit any performer or adult cabaret dancer to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of two a.m. and ten a.m. of any particular day.

B. It is unlawful for any performer or adult cabaret dancer of an adult business to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of two a.m. and ten a.m. of any particular day.

C. The hours of operation of any adult business which has a permit from the state ABC shall be governed by the provisions of its ABC permit and not by this section. (Ord. 1626 § 6, 2003; Ord. 1620 § 3 (part), 2002; Ord. 1481 § 3 (part), 1994)

18.60.085 Regulation of public restroom facilities.

If the adult use business provides restrooms for patron use, it shall provide separate restroom facilities for male and female patrons. The restrooms shall be free from sexually oriented materials and sexually oriented merchandise. Only one person shall be allowed in each restroom at any time, unless otherwise required by law, in which case the sexually oriented business shall employ a restroom attendant of the same sex as the restroom users who shall be present in the public portion of the restroom during operating hours. The attendant shall insure that no person of the opposite sex is permitted into the restroom,

and that not more than one person is permitted to enter a restroom stall, unless otherwise required by law, and, with the exception of urination, that no persons engage in any specified sexual activity in the public portion of the restroom. (Ord. 1553 § 13, 1999: Ord. 1540 § 13, 1998: Ord. 1539 § 13)

18.60.090 Adult business offering adult live entertainment – Operating requirements.

No person, association, partnership or corporation shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on the operation of an adult business which offers adult live entertainment unless each and all of the following requirements are met:

A. It is unlawful for any employee, owner, operator, responsible managing employee, manager or permittee of an adult business which offers adult live entertainment to allow any person below the age of eighteen years upon the premises or within the confines of any adult business which offers adult live entertainment if no liquor is served, or under the age of twenty-one if liquor is served.

B. Intentionally omitted.

C. Intentionally omitted.

D. All employees of adult business which offer adult live entertainment, other than performers while performing on the permanently fixed stage, shall, at a minimum while on or about the licensed premises, wear an opaque covering which covers their specified anatomical areas.

E. All adult live entertainment shall occur on a permanently fixed stage which is at least eighteen inches

above the level of the floor, and surrounded with a three foot high barrier or by a fixed rail at least thirty inches in height. A distance of at least four feet, measured horizontally, shall be maintained between patrons and on stage performers at all times during which said performer(s) are revealing specified anatomical areas and/or depicting or engaging in specified sexual activities. No on stage performer or on stage adult cabaret dancer shall have physical contact with any patron, and no patron shall have physical contact with any on stage performer or on stage adult cabaret dancer.

F. As to off stage performances, no performer shall perform adult live entertainment characterized by the exposure of specified anatomical areas or engaging in specified sexual activities off stage. As to an adult cabaret dancer then performing off stage, a distance of at least two feet shall be maintained between the adult cabaret dancer and patron(s) at all times. As to off stage performances, no adult cabaret dancer shall have physical contact with any patron and no patron shall have physical contact with any adult cabaret dancer, while the adult cabaret dancer is performing on the premises. This prohibition does not extend to incidental touching.

G. In addition, while on the premises, no performer or adult cabaret dancer shall have physical contact with a patron and no patron shall have physical contact with a performer or adult cabaret dancer, which physical contact involves the touching of the clothed or unclothed genitals, pubic area, buttocks, cleft of the buttocks, perineum, anal region, or female breast with any part or area of any other person's body either before or after any live entertainment by such performer or adult cabaret dancer. Patrons shall be advised of the no-touching requirements by signs and, if

necessary, by employees, performers or adult cabaret dancers of the establishment.

H. If patrons wish to pay or tip performers or adult cabaret dancers, payment or tips may be placed in receptacles. Patrons shall not throw monies to performers or adult cabaret dancers, hand monies directly to performers or adult cabaret dancers, place monies in the performers' or adult cabaret dancers' costumes or otherwise throw monies on the stage. Patrons shall be advised of these tipping and gratuity requirements by signs conspicuously placed on the premises. If necessary, patrons shall also be advised of the tipping and gratuity requirements by employees or independent contractors of the adult business.

I. The adult use business shall provide an entrance/exit to the premises for entertainers which is separate from the entrance/exit used by patrons. (Ord. 1626 § 7, 2003)

18.60.100 Lighting requirements.

All areas of the adult business shall be illuminated at a minimum of 1.25 foot-candle, minimally maintained and evenly distributed at ground level. (Ord. 1481 § 3 (part), 1994)

18.60.110 Permit – Requirements.

A. No adult business may be established within the city by right, all persons wishing to establish an adult business within the city must apply for and receive a conditional adult use permit under this chapter.

B. It is the burden of the applicant to supply evidence to justify the grant of a conditional adult use permit.

C. Any person desiring to operate an adult business within the city shall file with the planning department a conditional adult use permit application on a standard application form supplied by the planning department. (Ord. 1481 § 3 (part), 1994)

18.60.120 Permit - Contents of application.

A. The application must be signed by the owner or lessee. If the application is signed by anyone other than the owner, a notarized statement signed by the owner shall accompany the application. Proof of status is required.

B. Alternatively, the application is acceptable if signed by the applicant and co-signed by the property owner or tenant. Proof of status is required.

C. The application shall include the applicant's mailing address, and name and phone number of the person who is responsible for providing access to the proposed use for inspection purposes.

D. The application shall list the legal form of the applicant; e.g., individual, partnership, corporation:

1. If the applicant is an individual, the application shall list his or her legal name, any aliases and date of birth;

2. If the applicant is a partnership, the application shall list the full and complete name of the partnership, the legal names of all partners, dates of birth, and all

aliases used by all of the partners, whether the partnership is general or limited; and

3. If the applicant is a corporation, the application shall list the full and complete corporate name, the date and status of its incorporation, evidence that the corporation is in good standing, the legal names and dates of birth, and all aliases used, the capacity of all officers, directors and principal stockholders (i.e., all stockholders with ten percent or more of all outstanding shares), and the name and address of the registered officer for service of process.

E. The application must list whether, preceding the date of application, the applicant or any of the individuals listed pursuant to subsection D of this section, has:

1. Had a previous permit under this chapter revoked, as well as the date of such revocation;

2. Whether the applicant has been a partner in a partnership or an officer, director or principal stockholder of a corporation whose permit under this chapter has been revoked, as well as the date of the revocation;

3. Whether the applicant, if an individual, or any of the officers or general partners, if a corporation or partnership, have been found guilty or pleaded nolo contendere within the past four years of a misdemeanor or a felony classified by the state as a sex or sex-related offense.

F. The application must include the address of the proposed site, including the assessor's parcel number and the complete legal description of the property.

G. The application must include a detailed description of the proposed use, including reference to definitions in this chapter.

H. The application must include fourteen blue line prints of a plot plan indicating all structures, existing or proposed, parking areas, landscaping, walls, driveways and curb-cuts, signs, easements, topographical features, and any other pertinent items necessary to make a determination.

I. The application must include fourteen blue line prints showing all four elevations of any proposed structures and listing proposed exterior building materials. One set of elevation prints shall be colored or a materials board shall be submitted. In the case of existing buildings where a change of use is proposed and no structural changes are proposed, photographs may be accepted in lieu of elevation drawings if they show a front and rear elevation of the structure.

J. All applicants for a conditional adult use permit must also fill out the city's environmental package for purposes of complying with the California Environmental Quality Act (CEQA). (Ord. 1481 § 3 (part), 1994)

18.60.130 Permit – Application fee.

The city council, by resolution, shall set a reasonable nonrefundable application fee for persons applying for a conditional adult use permit. The fee shall not exceed the reasonable estimated costs of the city expended in processing the permit application. (Ord. 1481 § 3 (part), 1994)

18.60.140 Permit – Decision to grant or deny.

A. The planning commission ("commission") shall grant, conditionally grant, or deny an application for a conditional adult use permit under this chapter.

B. The completeness of an application shall be determined by the planning director within five working days of its submittal to the planning department, as required by the provisions of Section 18.60.120 of this chapter. If it is determined that the application is not complete, the applicant shall be notified in writing that the application is not complete and the reasons therefor, including any additional information necessary to render the application complete. Such writing shall be deposited in U.S. mail, postage prepaid, immediately upon determination that the application is incomplete. Within five working days following the receipt of an amended application or supplemental information, the planning director shall again determine whether the application is complete in accordance with the procedures set forth above. Evaluation and notification shall occur as provided above until such time as the application is found to be complete.

C. Upon the filing of a completed application, the commission shall cause to be made by its own members, or members of its staff, an appropriate investigation, including consultation with the building, police, fire and health departments and inspection of the premises as needed. Consultation is not grounds for the city to unilaterally delay in reviewing a completed application, nor is it grounds to extend the time period to conduct a hearing pursuant to Section 18.60.140 E.

D. In reaching a decision, the commission shall not be bound by the formal rules of evidence.

E. The commission shall notice and conduct a public hearing, within fifteen days of the completion of an application for a conditional adult use permit with notice of such hearing to be made pursuant to California Government Code Sections 65091 and 65905.

F. The planning commission shall render a written decision on the application for a conditional adult use permit within two days of the public hearing required by Section 18.60.140 E. In the event a traffic study is required to determine needed traffic improvements or mitigation measures pursuant to Chapters 10.48 and 10.52, the following deadlines shall apply.

The city shall determine whether a traffic study is required for the proposed use during the time when the application is being reviewed for completeness. If required, the city shall notify the applicant in writing of this requirement immediately upon such determination. The traffic study shall be submitted by the applicant within thirty days of the notification of the city's determination. Once submitted, the traffic study shall be reviewed by the city's traffic manager or his designee and his recommendation(s) forwarded to the planning commission, which shall hold a public hearing on the conditional adult use permit and traffic mitigation fees or measures within fifteen calendar days after submission of the traffic study. Notice of such hearing is to be made pursuant to California Government Code Sections 65091 and 65905. A decision shall be rendered by the commission within two days of the hearing and shall be in writing, a copy of such written decision to be immediately mailed to the applicant.

G. The failure of the commission to render any decision within the time frames established in any part of this section shall be deemed to constitute a denial.

H. The commission's decision shall be hand delivered or mailed to the applicant, and shall be provided in accordance with the requirements of this code. Any posted notices shall remain for at least ten days and mailed to all property owners within three hundred feet of the adult use business.

I. Notwithstanding any provisions in this chapter regarding the occurrence of any action within a specified period of time, the applicant may request additional time beyond that provided for in this chapter or may request a continuance regarding any decision or consideration by the city of the pending application. Extensions of time sought by applicants shall not be considered delay on the part of the city or constitute failure by the city to provide for prompt decisions on applications. (Ord. 1553 § 15, 1999: Ord. 1540 § 15, 1998: Ord. 1539 § 15, 1998: Ord. 1504 § 3, 1996; Ord. 1481 § 3 (part), 1994)

18.60.150 Permit – Appeal.

A. Any interested person may appeal the decision of the commission to the city council in writing within five days after the commission's written decision.

B. Consideration of an appeal of the commission's decision shall be at a public hearing, notice of which shall be given pursuant to California Government Code Sections 65091 and 65905 and which hearing shall occur within fifteen days of the filing or initiation of the appeal.

C. The city council action on the appeal of the commission's decision shall be by a majority vote of the members present and upon the conclusion of the de novo public hearing, the city council shall grant, conditionally grant or deny the appeal. The city council's decision shall be final and conclusive and shall be rendered in writing within two days of the hearing, such written decision to be immediately mailed to the party appealing the commission's decision.

D. In reaching its decision, the city council shall not be bound by the formal rules of evidence.

E. Notwithstanding any provisions in this chapter regarding the occurrence of any action within a specified period of time, the applicant may request additional time beyond that provided for in this chapter or may request a continuance regarding any decision or consideration by the city of the pending appeal. Extensions of time sought by applicants shall not be considered delay on the part of the city or constitute failure by the city to provide for prompt decisions on applications. (Ord. 1553 § 16, 1999: Ord. 1540 § 16, 1998: Ord. 1539 § 16, 1998: Ord. 1481 § 3 (part), 1994)

18.60.160 Permit – Judicial review of decision to grant or deny.

A. The time for a court challenge to a decision of the city council is governed by California Code of Civil Procedure § 1094.8.

B. Notice of the city council's decision and its findings shall include citation to California Code of Civil Procedure § 1094.8.

C. Any permit applicant whose permit has been denied or conditionally approved, to which such conditions the applicant objects, pursuant to this chapter shall be afforded prompt judicial review of that decision as provided by California Code of Civil Procedure § 1094.8. The city shall make every effort to expedite such review. (Ord. 1626 § 8, 2003)

18.60.170 Permit – Expiration.

A. Any unrevoked conditional adult use permit issued pursuant to this chapter, shall, by its own terms, expire no later than five years after its issuance.

B. Any conditional adult use permit approved pursuant to this chapter shall become null and void unless the proposed use is established within six months of the date from the approval. As to facilities that are a reuse of existing facilities, the conditional adult use permit shall become null and void unless the proposed use is established within six months from the approval, unless prior to said expiration date the permittee demonstrates to the satisfaction of the city's planning commission that it has a good faith intent to presently commence the proposed use. Such extensions shall not exceed a total of two six-month extensions. (Ord. 1481 § 3 (part), 1994)

18.60.180 Permit – Review for compliance.

All conditional adult use permits shall be reviewed by the planning commission six months from the issuance of the certificate of occupancy to determine if the proposed use is being operated in compliance with the issued

conditional adult use permit and every two years thereafter unless an immediate need is required due to noncompliance with the conditions of approval or due to public safety risks created by the use. The commission shall place the item on its nonhearing agenda. If the commission determines that additional review is necessary to amend or for possible revocation of the adult use permit, then the item shall be scheduled for planning commission action as a public hearing item and notice of such hearing shall be given as required by California Government Code and Chapter 18.58 of this code. (Ord. 1504 § 4, 1996)

18.60.190 Permit – Approval criteria.

The commission or city council shall approve or conditionally approve an application for a conditional adult use permit where the information submitted by the applicant substantiates the findings set forth in this section. Any conditions imposed upon the permit shall be in keeping with the objective development standards of this chapter and the underlying district or zone in which the property is located.

A. That the proposed use complies with the development and design requirements of the zone or land use designation in which it is to be located;

B. That the proposed use and its projected traffic generation is consistent with achieving or maintaining the established level of service set forth in the city's circulation element of the La Habra General Plan 2020, the county of Orange's Revised Traffic Improvement and Growth Management Ordinance ("Measure M") and the Orange County Congestion Management Program or as each of these may

be amended from time to time. If the city's established levels of service are exceeded, then mitigation measures will be required to insure that the established levels of service are met. If feasible identified improvements are not available then alternate mitigations, such as described in the Traffic Phasing Ordinance, can be utilized by the applicant to offset project generated traffic impacts;

C. That the proposed use satisfies the following objectives:

1. That the proposed use and its projected demand for water facilities will establish and maintain adequate fire flows as established by the current approved and adopted fire code and any adopted amendments and sufficient water storage for emergency situations and for maintenance of service pressures on an on-going basis,

2. That the proposed use will provide and maintain flood control and storm drainage facilities to the level of service established by the city's Storm Drain Master Plan of 1992 or as may be amended from time to time,

3. That the proposed use will provide and maintain wastewater to establish and maintain an unrestricted flow in sanitary sewers during average and peak conditions as established by the city's Sewer Master Plan of 1978 or as may be amended from time to time,

4. That the proposed use will provide and maintain solid waste services to establish and maintain a level of service consistent with the city's general plan, including the source reduction and recycling element,

5. That the proposed use will provide and maintain fire prevention and suppression services as established by the current approved and adopted edition of the fire code

and any adopted amendments to establish and maintain minimum response time for fire and emergency medical calls as established by the city of La Habra's general plan,

6. That the proposed use will provide and maintain police services and crime prevention services to establish and maintain minimum response time for police calls for service as established by the city's general plan;

D. The requested use at the proposed location will not be located within a two hundred seventy-five-foot radius to any residential zone. The distance between a proposed use and a residential zone shall be measured from property line to property line;

E. The requested use at the proposed location will not be located within a two hundred seventy-five foot radius to any residential zone. The distance between a proposed use and a residential zone shall be measured between the nearest exterior wall of the proposed use, and the nearest lot line included within the residential zone, along a straight line extended between the two points;

F. The requested use at the proposed location will not be located within one hundred fifty feet of any other regulated use under this chapter. Distances between uses shall be measured between the nearest exterior walls of such uses or proposed uses along the shortest route intended and available for public traverse between said uses;

G. The signs posted at the business shall conform to the regulations established in Chapter 15.40 of this code; and

H. That neither the applicant, if an individual, or any of the officers or general partners, if a corporation or

partnership, have been found guilty or pleaded nolo contendere within the past four years of a misdemeanor or a felony classified by the state as a sex or sex-related offense. (Ord. 1504 § 5, 1996; Ord. 1481 § 3 (part), 1994)

18.60.200 Permit – Revocation.

A. Any permit issued pursuant to the provisions of this chapter may be revoked by the city on the basis of any of the following:

1. That the business or activity has been conducted in a manner which violates one or more of the conditions imposed upon the issuance of the permit or which fails to conform to the plans and procedures described in the application, or which violates the occupant load limits set by the fire department;

2. That the permittee has failed to obtain or maintain all required city, county and state licenses and permits;

3. That the permit is being used to conduct an activity different from that for which it was issued;

4. That the permittee has misrepresented a material fact in the application for permit or has not answered each question therein truthfully;

5. That due to changes in on-site conditions, the adult business lacks sufficient on-site parking areas for employees and the public under the standards set forth in the city's parking code, except for an existing use that is legal and nonconforming with respect to parking;

6. That the building or structure in which the adult business is conducted shall be utilized in a manner that is at all times in compliance with the current approved and adopted edition of the various Uniform Building, Uniform Fire, Uniform Electrical and Uniform Plumbing Codes adopted by the city to insure that the operation is not hazardous to the health or safety of the employees or patrons of the business or of the general public;

7. That the permitted business creates sound levels which violate the noise control ordinance of the city;

8. That the security measures provided by the permittee have not been adequate to deter unlawful conduct by the employees or patrons of the facility such that the city's public safety departments response to calls for service at the facility is above the average number of calls for service by other entertainment type facilities;

9. That the use for which the approval was granted has ceased to exist or has been suspended for six months or more.

B. Written notice of hearing on the proposed permit revocation, together with written notification of the specific grounds of complaint against the permittee shall be personally delivered or sent by certified mail to the permittee at least ten days prior to the hearing.

C. The revocation hearing shall be heard by the commission. The commission shall not be bound by the formal rules of evidence at the hearing.

D. The commission shall notice and conduct a public hearing, as prescribed in the code, on the proposed permit revocation.

E. The commission shall make its decision to revoke or not revoke the permit within thirty days of the public hearing.

F. The commission shall revoke, not revoke, or not revoke but add additional conditions to, the permittee's conditional adult use permit. The commission's decision shall be in writing, and shall be hand delivered or mailed to the applicant and mailed to all property owners within three hundred feet of the use.

G. Any interested person may appeal the decision of the commission to the city council in writing within fourteen days after the written decision of the commission.

H. Consideration of an appeal of the commission's decision shall be at a duly noticed public hearing and shall occur within thirty days of the filing or initiation of the appeal.

I. Upon the conclusion of a de novo public hearing, the city council shall approve, conditionally approve or reject the decision of the commission.

J. In reaching a decision, the city council shall not be bound by the formal rules of evidence.

K. The city council action on appeal of the commission's decision shall be by a majority vote of the quorum of the city council and shall be final and conclusive. The city council's decision shall be based upon written findings.

L. The time for a court challenge to a decision of the city council is governed by California Code of Civil Procedure § 1094.8.

M. Notice of the city council's decision and its findings shall be mailed to the applicant and shall include citation to California Code of Civil Procedure § 1094.8.

N. In the event a permit is revoked pursuant to this chapter, another conditional adult use permit to operate an adult business shall not be granted to the permittee within twelve months after the date of such revocation.

O. The status quo shall be maintained pending final determination of the revocation of a permit under this chapter. If a judicial action is commenced challenging the revocation, the status quo shall be maintained until such time as a judicial decision is rendered from the court in which the action is filed. (Ord. 1626 § 9, 2003; Ord. 1553 § 19, 1999; Ord. 1540 § 19, 1998: Ord. 1539 § 19, 1998: Ord. 1504 § 6, 1996; Ord. 1481 § 3 (part), 1994)

18.60.210 Amortization of legal nonconforming uses.

A. Notice. Chapter 18.08.070 et seq., establishes various amortization periods for a nonconforming use, for both a conforming and nonconforming building. The commission should provide written notice to the owner (and lessee/operator, if known by reference to city's business license records) at least one hundred twenty days prior to the expiration of this amortization period. This notice is not mandatory and lack of notice shall not be deemed to prevent the city from initiating an action seeking declaratory or injunctive relief against the owner and/or operator of such business. However, if notice of expiration of amortization period is not given, any application by the owner or lessee/operator of the business for an

extension or waiver of the amortization period shall not be denied on the grounds that it is untimely.

B. Application for Extension or Waiver.

1. The owner may file an application with the commission for an extension and/or waiver of the amortization period. The applicant must state:

a. Whether a previous extension has been requested and granted, as well as the date of the previous request; and

b. The efforts that will be made to conform by the conclusion of the extended period.

2. The owner's application shall be made in writing and shall be accompanied by the required fee as established by the city council.

C. Decision to Grant or Deny.

1. The commission shall hold a public hearing at which time it shall consider the evidence and testimony regarding the request for an extension of the amortization period. The commission shall grant or deny an application for extension or waiver of the amortization period. The commission shall make its decision within thirty days of the filing of the request.

2. In rendering its decision, the commission shall determine whether the adult business has been provided with a reasonable amortization period commensurate with the investment involved. If the commission determines that the amortization period is not reasonable it shall prescribe an amortization period that is commensurate with the investment involved. The burden shall be on the

applicant to establish that the extension should be granted. The commission shall consider the following factors in making its determination:

a. The adult business owner's financial investment in the business;

b. The present actual and depreciated value of business improvements;

c. The applicable Internal Revenue Service depreciation schedules;

d. The remaining useful life of the business improvements;

e. The remaining lease term;

f. The cost of relocating the business to a site conforming with the provisions of this chapter;

g. The ability of the business and/or land owner to change the use to a conforming use;

h. The date upon which the property owner and/or business operator received notice of the non-conforming status of the use and the amortization requirements; and

i. The effects of the health, safety and welfare of surrounding businesses and uses if the adult business is permitted to extend the amortization period.

3. The commission's decision shall be in writing, and shall be hand delivered or sent by certified mailed to the applicant, and shall be posted at city hall and on the outside of the adult business. Posted notices shall remain for at least ten days and mailed to all property owners within three hundred feet of the use.

D. Appeal.

1. Any interested person may appeal the decision of the commission to the city council in writing within fourteen days after the written decision of the commission.

2. Consideration of an appeal of the commission's decision shall be at a duly noticed public hearing and shall occur within thirty days of the filing or initiation of the appeal.

3. Upon the conclusion of a de novo public hearing, the city council shall grant, conditionally grant or deny the application.

4. In reaching a decision, the city council shall not be bound by the formal rules of evidence.

5. The city council action on appeal of the commission's decision shall be by a majority vote of the quorum of the city council and shall be final and conclusive. The council's decision shall be based upon written findings.

E. Judicial Review of Decision to Grant or Deny.

1. The time for a court challenge to a decision of the city council is governed by California Code of Civil Procedure § 1094.8.

2. Notice of the city council's decision and its findings shall be mailed to the applicant and shall include citation to California Code of Civil Procedure § 1094.8.

F. Public Nuisance. The city council declares to be a public nuisance any parcel where an adult business is operating where the amortization period as a legal nonconforming use has expired and (a) no application for a waiver

or extension is on file or has been granted, or (b) no application for a conditional adult use permit is on file or has been granted. (Ord. 1626 § 10, 2003; Ord. 1481 § 3 (part), 1994)

18.60.220 Applicability to other regulations.

The provisions of this chapter are not intended to provide exclusive regulation of the regulated adult uses. Such uses must comply with any and all applicable regulations imposed in other articles of the zoning code, other city ordinances, and state and federal law. (Ord. 1481 § 3 (part), 1994)

18.60.230 Conduct constituting a public nuisance.

The conduct of any business within the city in violation of any of the terms of this chapter is hereby found and declared to be a public nuisance, and the city attorney or the district attorney may, in addition or in lieu of prosecuting a criminal action hereunder, commence an action or proceeding for the abatement, removal and enjoinment thereof, in the manner provided by law; and shall take other steps and shall apply to such courts as may have jurisdiction to grant such relief as will abate or remove such adult use establishment and restrain and enjoin any person from conducting, operating or maintaining an adult use establishment contrary to the provisions of this chapter. (Ord. 1481 § 3 (part), 1994)

18.60.240 Violations – Penalties.

A. Any owner, permit holder, operator, manager, employee or independent contractor of an adult business violating or permitting, counseling, or assisting the violation of any of these provisions regulating adult businesses shall be subject to any and all civil remedies, including permit revocation. All remedies provided herein shall be cumulative and not exclusive. Any violation of these provisions shall constitute a separate violation for each and every day during which such violation is committed or continued.

B. The restrictions imposed pursuant to this chapter are part of a regulatory licensing process, and do not constitute a criminal offense. Notwithstanding any other provision of the La Habra Municipal Code, the city does not impose a criminal penalty for violations of the provisions of this chapter related to sexual conduct or activities. (Ord. 1626 § 11, 2003)

18.60.250 Severability.

Should any section, subsection, clause or provision of this chapter for any reason be held to be invalid or facially unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this chapter, it being hereby expressly declared that this chapter, and each and every section, subsection, sentence, clause and phrase hereof would have been prepared, proposed, approved, adopted and/or ratified irrespective of the fact that any one or more section, subsections, sentences, clauses or phrases of this chapter be declared invalid or unconstitutional, including,

but not limited to, the locational and operational requirements contained in Sections 18.60.010, 18.60.020, 18.60.030, 18.60.040, 18.60.050, 18.60.060, 18.60.070, 18.60.080, 18.60.085, 18.60.090, 18.60.100, and 18.60.200. (Ord. 1553 § 18, 1999: Ord. 1540 § 18, 1999: Ord. 1539 § 18, 1999)

Supreme Court, U.S.
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No. 05-30

IN THE

Supreme Court of the United States

BILL BADI GAMMOH, MEGHANN LARA ANN ONSELEN, LESLIE WEST, ARMINE MICHELLE BEDROSIAN, CHRISTINE JOHANNA FEHER, CHRISTINE JOCELYN YOCIUS-ESCALONA, CHARBONESSE GARRETT, HEATHER ELOISE ELAM, and STACY JOY ANDRE,

Petitioners,

v.

CITY OF LA HABRA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

STUART MILLER
Counsel of Record
SCOTT W. WELLMAN
WELLMAN & WARREN LLP
24411 Ridge Route, Suite 200
Laguna Hills, CA 92653
(949) 580-3737

Attorneys for Petitioners

196111

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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The Ninth Circuit is now in disharmony with courts throughout the nation regarding the regulation of the more modest and benign forms of adult entertainment. In the Ninth Circuit, and only in the Ninth Circuit, the legal principles governing patrons' intimate manipulations of performers' nude bodies apply unabated to the murmurings of untouched bikini-clad dancers whose performances would not be remarkable even in many mainstream contexts.

The City has not succeeded in reconciling the decision below with the rulings of other Circuits.

In *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), the Sixth Circuit ruled that *sexually oriented* is an "apparently meaningless term." *Id.* at 389. Although the City asserts that this ruling "is irrelevant here" (Opp. at 6), its argument reinforces, rather than rebuts, the conclusion that the Sixth Circuit is in conflict with the Ninth.

The City argues that in *Deja Vu*, *sexually oriented* "had no independent utility in the ordinance." (Opp. at 7.) However, the City's defense of its own ordinance is based on the argument that neither *sexually oriented* nor the other challenged phrases have any "independent utility" in the La Habra ordinance, either.

The City has never explained the meaning of any of the contested terms in its definition of "adult cabaret dancer." Rather, it has argued strenuously that the independent and unchallenged element of presence in an adult entertainment facility *in itself* sufficiently clarifies the cryptic components of the definition.

For example, the City states that "There is no dispute that the Taboo regularly features nude and semi-nude dancing, which places the phrase 'sexually oriented' in a readily understandable context." (Opp. at 8.) Later, it argues that "the definition [is]

sufficiently clear and readily understandable in the context of an adult cabaret." (Opp. at 17.)

In other words, *sexually oriented* and the other challenged elements have no independent significance. The only guidance offered by the City is that a dance is more likely to be "sexually oriented" and to "focus on or emphasize" the dancer's clothed breasts or buttocks "on a regular and substantial basis" if it occurs in a certain type of building than if it occurs elsewhere.

The Court of Appeals accepted this meaningless explanation. In response to the dancers' insistence that they need to know how to perform a dance that is *not* encompassed by the definition (*see* Pet. at 11-12), the Court offered only the circular observation that any clothed dance in an adult cabaret *ipso facto* must be "sexually expressive." (App. A at 8a n.3.) Similarly, the Court presumed that "the appellant dancers' performances . . . 'focus on or emphasize breasts, genitals, and or buttocks'" (App. A at 15a [ellipsis and brackets omitted]), regardless of the dancers' specific movements.

Thus, as in *Deja Vu*, *sexually oriented* and the other challenged phrases are "apparently meaningless term[s]," 274 F.3d at 389, with no "independent utility." (Opp. at 7.) Like the ordinance in *Deja Vu*, the La Habra definition "vests virtually complete discretion in the hands of the police," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), and is unconstitutionally vague.

The City in fact acknowledges the excessive discretion of its police officers. With regard to the admissions of Officer McPhail that the ordinance is hopelessly subjective and that the

City has not trained its officers in enforcing it (*see* Pet. at 4), the City argues:

> Importantly, when questioned as to the definition as a whole for "adult cabaret dancer," Officer McPhail testified that the definition was sufficiently clear and readily understandable in the context of an adult cabaret.

(Opp. at 17.) Although Officer McPhail may think he knows an adult cabaret dancer when he sees one, an individual police officer's confidence in his or her personal judgment increases, rather than reduces, the likelihood of arbitrary and discriminatory enforcement of an ordinance with multiple "unarguably subjective" elements. (App. A at 6a.)

The Supreme Court of Tennessee recently held an ordinance defining *adult bookstore* in terms of a "substantial or significant portion of its stock and trade" to be vague under the First Amendment largely because, as here, the officers charged with its enforcement had not been trained in its application and could not explain what it meant, but were confident they could apply it anyway:

> [T]he inability of the officers charged with enforcing the ordinance to define its key terms weighs heavily against the ordinance's constitutionality. Knoxville Police Officers Ferguson, Major, and Shelton all testified that they were unable to define "substantial." The officers testified that the City had not instructed them as to what constituted a substantial portion of sexually-explicit material but that they, personally, knew what "substantial" meant. . . . [H]owever, "I know it when I see it" is not a constitutionally-sound standard. Particularly when speech is being regulated, the Constitution demands that government

> bodies make a greater attempt to define what conduct is prohibited to avoid chilling protected speech.

City of Knoxville v. Entertainment Resources LLC, __ S.W.3d __, 2005 WL 1523918 at *5 (No. E2002-01143-SC-R11-CV) (Tenn. June 29, 2005).

The City's distinctions of *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), and *Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004), from the present case are equally invalid. (Opp. at 9-10.) Gammoh cited those cases for the principle that a municipality may not restrict a dancer's particular movements. (Pet. at 17-18.) The City's observation that each case involved an ordinance that unconstitutionally barred nudity is beside the point. In both cases, the bans on nudity and on dance movements were independent constitutional violations. *Schultz*, *supra*, 228 F.3d at 847; *Dream Palace*, *supra*, 384 F.3d at 1019-20; *see* Pet. at 18 n.4.

Moreover, in both cases, the Courts annulled ordinances forbidding the depiction of what the La Habra ordinance refers to as "specified sexual activities." *Schultz*, *supra*, 228 F.3d at 836-37, 847-48; *Dream Palace*, *supra*, 384 F.3d at 1017-18; La Habra Municipal Code § 18.60.010 (Resp. App. at 6-7). By definition, "adult cabaret dancers" in La Habra do *not* depict "specified sexual activities" or display "specified anatomical areas." Unlike the nude or semi-nude performances in *Schultz* and *Dream Palace*, which are merely "within the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991), "adult cabaret dances" are fully-protected expressive conduct. *Schultz* and *Dream Palace* obviously conflict with the decision in the present case, which upheld an ordinance limiting the movements of *clothed* dancers who do *not* depict sexual acts.

In *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004), the Seventh Circuit explicitly followed its earlier ruling in *Schultz* that a municipality may not restrict the particular gestures of "clothed dancers who convey an erotic message through their movements." *Id.* at 412-14. The City asserts that *R.V.S.* held that "terms such as 'exotic dance,' 'striptease,' and 'sexual activity,' would be sufficient to pass constitutional muster if the ordinance regulated dancing by clothed individuals at clubs that present nude or semi-nude dancing." (Opp. at 7-8.) In fact, the Court only ruled that the ordinance "might" be constitutional if it "applied only to bars and clubs that present nude or semi-nude dancing," *id.* at 412, and that its constitutionality still would be "questionable." *Id.* at 411. Moreover, in the passage cited by the City, the Court was discussing whether the ordinance had the evidentiary basis required by *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), not whether it was unconstitutionally vague or an impermissible restraint on expression.

The decision below also conflicts with *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001), which held that a restriction on dancers clad in bathing suits, like the dancers in the present case, could not be based upon studies of secondary effects caused by nude entertainment. The City has taken a passage of *Ways* out of context (Opp. at 13), without addressing its ruling that each activity regulated by an adult-use ordinance must itself cause adverse secondary effects. (*See* Pet. at 27.)

In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), and *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), the Eleventh Circuit reversed summary judgments in favor of municipalities that had enacted ordinances containing factual findings that contradicted studies of the effects of adult uses within their own borders. (Pet. at 25-26.) The City attempts to distinguish those cases on the ground that while it did possess

data gathered within its borders that contradict the findings in its ordinance, it had not actually analyzed those data. (Opp. at 13-15.)

This distinction is of no effect, because if the City's decision not to analyze its own data does not suffice to impeach the ordinance under the first step of the *Alameda Books* analysis, the uncontested results of Gammoh's analysis of the data would "cast direct doubt" on the City's findings under step two of *Alameda Books*. *Alameda Books*, *supra*, 535 U.S. at 438; *see* Pet. at 25-29. The point of *Peek-a-Boo* and *Flanigan's* is that an ordinance based on findings of fact that are contrary to data collected within the municipality cannot survive summary judgment under *Alameda Books*. Indeed, the Eleventh Circuit expressly held that the post-enactment presentation of such data is sufficient for a plaintiff to prevail on the second step of *Alameda Books*. *Peek-a-Boo*, *supra*, 337 F.3d at 1270-72.

Gammoh's comprehensive analysis of data gathered by the City rebutted the City's findings that adult uses cause adverse secondary effects within La Habra. Both *Peek-a-Boo* and *Flanigan's* flatly contradict the Ninth Circuit's ruling that such a presentation is insufficient to defeat a municipality's motion for summary judgment.

In short, the decision of the Court of Appeals creates the following intercircuit conflicts: (1) a conflict with the decisions of the Seventh Circuit in *Schultz* and *R.V.S.* as to whether a municipality may regulate a dancer's particular movements; (2) a conflict with the decision of the Sixth Circuit in *Deja Vu* regarding the vagueness of undefined terms such as *sexual orientation*; (3) a conflict with the decisions of the Seventh Circuit in *R.V.S.* (*see* Pet. at 26-27) and the Eighth Circuit in *Ways* regarding the necessity of demonstrating that each regulated activity causes adverse secondary effects; (4) a conflict with the decision of the Seventh Circuit in *R.V.S.* that clothed

dancing cannot be restricted on the ground that nude dancing causes adverse secondary effects; and (5) a conflict with the decisions of the Eleventh Circuit in *Peek-a-Boo* and *Flanigan's* regarding the effect of data compiled by a municipality about the consequences of adult uses within its own borders.

The City's failure to cite in its favor a single case involving *clothed* entertainment proves that the decision below conflicts with the strong national trend holding that the requirements of the vagueness doctrine, the quality of evidence needed to support an ordinance, and other First Amendment principles all vary to some degree in relation to the sexual explicitness and physical intimacy of the regulated conduct.

The City has emphasized this point by relying upon two lines of cases that expressly limited their holdings to extreme hardcore material or to physical contact with nude entertainers.

One set of decisions upheld distance requirements between patrons and nude dancers, usually in situations in which the patrons and dancers otherwise were engaging in intimate physical contact. (Opp. at 9.) The City makes four errors in relying upon these cases.

First, nude dancing receives far less protection under the First Amendment than clothed dancing. *Barnes v. Glen Theatre*, *supra*, 501 U.S. at 566.

Second, the "message" in the cases cited by the City was nothing more than the sheer visual impact and fondling of naked breasts and raw genitalia. These primitive forms of communication are not comparable to the complex artistic and emotional messages conveyed by clothed dancing and conversation (*see* Pet. at 5-6), and the rulings cited by the City cannot be extended into a principle that every distance requirement everywhere is valid *per se*.

Third, and really most important, is the fact that Gammoh is not challenging the two-foot distance requirement. The La Habra ordinance does not prohibit proximity, or even physical contact, between dancers and patrons.[1] It only prohibits dancers who are within two feet of patrons from expressing themselves through certain vaguely-defined types of dance. This case involves a restraint on expression, not a distance requirement.

The City also invokes *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), and other cases following it, for the notion that the phrases *regular and substantial basis* and *focuses on or emphasizes* have "repeatedly survived vagueness challenges." (Opp. at 17.) However, those cases are inapplicable here for several reasons.

First, *Young* and its progeny all involved sexually-explicit material or physical contact between patrons and nude or topless dancers, while the La Habra definition specifically excludes sexually-explicit, nude, and topless performances, eliminating any objective test of what conduct the ordinance covers. Second, the definitions in the cited cases did not involve the coinciding interpretation of four separate unclear terms (*sexually-oriented*, *regular basis*, *substantial basis*, and *focuses on or emphasizes*), all of which must be present for the La Habra ordinance to apply. Third, the definitions in the cited cases were not dependent upon the subjective perceptions of the viewer, as the La Habra ordinance is. (*See* Pet. at 4.) Fourth, *Young* expressly applies only to sexually-explicit merchandise and entertainment.

Young involved a challenge to an ordinance that classified a theater as "adult" if it presented "material distinguished or

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1. As Gammoh has explained, whether his performers are dancing or not, they never engage in the physical interaction with patrons that the City prohibits only during "adult cabaret dances." He therefore does not challenge the restriction on physical contact applicable during those dances. (*See* Pet. at i-ii, 3, 19.)

characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.'"[2] *Id.* at 53. The plaintiffs argued that the definition was vague because "they cannot determine how much of the described activity may be permissible before the exhibition is 'characterized by an emphasis' on such matter." *Id.* at 58. The Court found it "unnecessary to consider the validity of this argument in the abstract," because "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.* at 58-59. It repeatedly emphasized that its ruling applied only to situations involving sexually-explicit material. *Id.* at 59, 59 n.16, 61.

No one could be confused about whether the gross and blatant skin flicks or the graphic photographs of genitalia, intercourse, and oral sex offered by the *Young* businesses were "characterized by an emphasis" on specified sexual activities and anatomical parts. One has no such confidence in determining whether a clothed dancer who does not depict "specified sexual activities" nevertheless is "sexually-oriented" and "emphasizes [her] buttocks" "on a regular and substantial basis." Rather, each police officer must independently determine if the definition applies, based solely upon an idiosyncratic understanding of a host of obscure terms, and an unchecked ability to "predict . . . what the performer's going to do." (ER 818.)

Like adult publications and internet postings, adult entertainment ranges "from the modestly titillating to the hardest-core." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997). Virtually every court to address the regulation of adult entertainment has recognized that restrictions and legal

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2. The definitions of specified sexual activities and specified anatomical areas in Young are similar to those in § 18.60.010 of the La Habra Municipal Code. (Resp. App. at 6-7.) Gammoh does not challenge those definitions.